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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 327

JOSEPH G. WILSON,
Petitioner,

versus

OIL TRANSPORT COMPANY, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner, Joseph G. Wilson, a merchant seaman, respectfully prays that a Writ of Certiorari issue herein to the United States Court of Appeals for the Fifth Circuit to review its judgment entered herein on March 27, 1957, regarding which said judgment a petition for rehearing was denied by the Court of Appeals on May 3, 1957.

OPINIONS IN THE LOWER COURTS

This cause was tried to a jury which returned a verdict in favor of respondent. The District Court for the Eastern

District of Louisiana, New Orleans Division, rendered no opinion in the case, but entered judgment on the verdict.

Petitioner appealed to the Court of Appeals for the Fifth Circuit and that Court's opinion is reported officially at 242 F. 2d 727 (1957). The opinion of the Court of Appeals is also printed in Appendix "A" of this application.

JURISDICTION

This was an action under the Jones Act[1] and the General Maritime Law.

The judgment of the Court of Appeals for the Fifth Circuit was rendered and entered on March 27, 1957;[2] the order of the Court of Appeals denying petitioner's timely application for rehearing was rendered and entered on May 3, 1957.[3]

Jurisdiction of this Honorable Court is envoked under Title 28, U. S. Code, Section 1254(1).

THE QUESTIONS PRESENTED

(1) Does the fact that this is a claim for personal injuries exclude from application to the case the rationale of this Honorable Court's opinion in the case of *The Pennsylvania*,[4] which held that where a vessel involved in collision is guilty of a statutory navigational fault, the burden is upon that

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[1] 46 U. S. C. A. 688, et seq.
[2] R 343.
[3] R 348.
[4] 19 Wall. 125, 86 U. S. 125, 22 L. Ed. 148 (1873).

vessel to show that the fault of which she was guilty, not only did not, but, could not have caused or contributed to the disaster?

(2) Should a Court of Appeals, in reviewing the evidence upon which a jury's verdict is based, impute to the jury an inference or conclusion which implies that the jury fell far short of a fair performance of its constitutional function?

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The constitutional provision applicable to the instant matter is Article 3, Section 2, Clause 1:

> "The judicial Power shall extend to all Cases . . . of admiralty and maritime jurisdiction; . . . "

The statutes involved are the *Jones Act*,[5] reading in part as follows:

> "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply . . . "

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[5]Supra, note 1.

The *Federal Employers Liability Act*,[6] reading in part as follows:

> "Every common carrier by railway while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of death of such employee * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its . . . equipment . . ."

> "That in any action brought * * * by virtue of any of the provisions of this chapter, to recover damages for injuries to, or the death of, any of its employees, such employees shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of its officers, agents, or employees of such carrier; and no employee shell be held to have assumed the risk of his employment in any case where the violation * * * of any statute enacted for the safety of employees contributed to the injury or death of such employee."

And The *Inland Rules*[7] reading in part as follows:

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[6] 45 U. S. C. A. 51, et seq.
[7] 33 U. S. C. A. 151, et seq.

"33 U.S.C.A., Sec. 221. Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences . . . of any neglect to keep a proper lookout . . . "

STATEMENT OF THE CASE

Petitioner, a seaman, brought this action against respondent, his former employer, for damages which petitioner allegedly sustained while serving aboard respondent's vessel, SUWANNEE.

After a trial by jury, there was a verdict in favor of respondent[8] upon which the District Court entered judgment dismissing the case.[9]

Petitioner appealed to the United States Court of Appeals for the Fifth Circuit which affirmed the dismissal of petitioner's suit.[10]

By this application, petitioner seeks a writ of certiorari to the Court of Appeals for the Fifth Circuit, to the end that this Honorable Court will review this cause and remand the same to the District Court for a new trial.

THE FACTS

In the early morning hours of February 4, 1950, the SUWANNEE, a 650 H.P. diesel, engine-room-controlled tug,

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[8]R 11.
[9]R 326.
[10]R 343.

seventy-six feet in length, was making her way along the Intracoastal Waterway, travelling east, toward New Orleans, approaching Mile 244, West of Harvey, Louisiana.[11]

The vessel was pushing two loaded oil barges of 250 feet in length, each, secured in tandem to the vessel's bow with one inch cable.[12] The SUWANNEE was proceeding at about six knots, with a three and one-half mile fair current.[13]

Just prior to reaching Mile 244, the vessel and tow approached a bend with which her pilot was familiar.[14] The pilot sounded a bend signal (one prolonged blast of his whistle) but there was no answer.[15] Shortly thereafter, a tug, without tow, rounded the bend ahead of the SUWANNEE and the two vessels passed without mishap, port to port, before the SUWANNEE'S lead barge had reached the bend.[16]

While the SUWANNEE herself was still about 600 feet from the bend, the pilot noticed another tug and tow of more than one barge, not yet abreast of the SUWANNEE'S lead barge, travelling toward the SUWANNEE toward the center of the waterway.[17] This second vessel and tow had been hidden from the pilot's view by the first tug.[18]

The pilot immediately sounded the danger signal, ordered

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[11]R 122, 126.
[12]R 120, 121, 138, 146.
[13]R 143, 151.
[14]R 123.
[15]R 126-127.
[16]R 130.
[17]R 130-132.
[18]R 131.

the engines brought to full reverse and gave the SUWANNEE a hard right rudder.[19] Putting the vessel hard to starboard caused her lead barge to strike the side of the waterway and slide along the bank of the channel.[20] This resulted in the parting of one of the towing cables, the ultimate effect of which was to heel the SUWANNEE over on her port side through which she took water and sank.[21]

During all of the foregoing, petitioner was asleep in his bunk below deck.[22] He was allegedly injured making his escape from the sinking vessel.[23]

At and prior to the time the SUWANNEE approached the bend, the pilot was alone in the wheelhouse.[24] There was an engineer on duty in the engine room[25] and there was a deckhand awake at the time to serve as lookout;[26] he was in the galley of the vessel at the time of the disaster.[27]

REASONS RELIED ON FOR GRANTING THE WRIT

(1)

Applicability of the Pennsylvania Rule[28]

Whether or not the rule of *The Pennsylvania* applies in

19R 148-150.
20R 150.
21R 150.
22R 64-65.
23R 71, 74, 75, 80, 81-84, 86.
24R 152.
25R 152.
26R 152-153.
27R 152-153.
28Supra, note 4.

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PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

MAY IT PLEASE THE COURT:

Respondent asserts that: "The question of adequacy of lookout is one of fact."

Under the instant circumstances, respondent implies that the jury could have found that a tug, heavily laden, traveling at night in a narrow, well-traveled, winding waterway, with only a helmsman on deck, was maintaining the "proper lookout" contemplated by Congress in the Inland Rules.

To put respondent's contention still another way, it is: The helmsman is a proper lookout.

This is diametrically contrary to legal definition:

> "Proper lookouts are competent persons, *other than the master and helmsman*, properly stationed for that purpose on the forward part of the vessel; . . ."[1] (Emphasis added).

Since the so-called "lookout" in the instant case was not on the forward part of the vessel, nor even on deck, nor even in the pilothouse, we submit that there is not a scintilla of evidence upon which the jury could have found as a fact that a "proper lookout" was maintained.

Therefore, as a matter of fact and law, respondent was guilty of a statutory navigational fault.

In its brief, respondent quotes a *part* of the charge given by the trial court.

We submit that it is from the entire charge, taken as a *whole* rather than piecemeal, that the correctness of the trial court's instructions is to be determined.

The sentence of the charge, from which respondent has quoted only in part, was given by the court as follows:

> "If you find, under the evidence in this case, that in the management and operation of the Tug SUWANNEE, the defendant, Oil Transport Company, Inc., through those in charge of the navigation of the Tug SUWANNEE, was guilty of any breach of the rules regarding signals or proper lookout as heretofore stated to you, *and that such*

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[1]Ziegler v. Bacon, 167 F. 2d 676, 678 (C.C.A. 5th, 1948).

breach proximately caused or contributed to the sinking of the Tug SUWANNEE, you may return your verdict in favor of the plaintiff."[2] (Emphasis added).

This charge, alone, is not compatible with the rule of *The Pennsylvania*, because, under *The Pennsylvania* rule, proximate cause is *presumed* from the breach of a statutory regulation. Therefore, the charge was not proper without additional clarification on the part of the trial court; the jury should have been instructed as to the obligation of *respondent* to *rebut* the legal *presumption* of causal connection and liability resulting from failure to have the proper lookout. In other words, while the jury had to find causal connection to return a verdict for plaintiff, *this finding was permissible by presumption* and did not depend only upon evidentiary proof. The existence of the presumption was not made known to the jury by the court.

Moreover, a reading of the whole charge given by the trial court will also disclose that the jury was in other ways not instructed in accordance with the rule of *The Pennsylvania*.

On three occasions[3] the court informed the jury that the plaintiff had the burden of proof, and, in one instance, that the burden of proof never shifted.[4] Furthermore, an express instruction was given to the effect that, in order to recover, the plaintiff was required to have affirmatively

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[2]R. 301
[3]R. 295, 296, 303
[4]R. 293

shown that the accident was proximately caused by the negligence of respondent.

The Court charged the jury that the burden of proof lay with the plaintiff and remained with the plaintiff.[5] The court repeated on several occasions that proximate cause was a necessary finding and must have been proved by the plaintiff.

These charges were the antitheses of the rule of *The Pennsylvania* which creates a legal *presumption* that the defendant's failure to comply with statutory regulations is causally related to the casualty. *Presumption is inherent* in the rule of *The Pennsylvania;* under the rule, *causation is presumed;* it need not be proved.

Taking the trial court's charge as a whole, we submit that this jury required petitioner to prove that the absence of a lookout caused or contributed to the sinking of the SUWANNEE; the essence of the court's charge gave petitioner that burden. Under the rule of *The Pennsylvania*, however, this was not petitioner's obligation.

Since the law given to the jury was materially different from the law which the jury ought to have been given, the case should be reviewed by this Honorable Court and re-

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[5] R. 296.

manded for a new trial, toward which end all of the foregoing is

Respectfully submitted.

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By: _____

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CERTIFICATE

I, the undersigned, being a member of the bar of the Supreme Court of the United States, hereby certify that I have this day served copies of the above and foregoing Reply Brief upon counsel for respondent by depositing the same in the United States Mails, postage pre-paid at New Orleans, Louisiana, addressed to Eberhard Deutsch, Esquire, Hibernia Bank Building, New Orleans 12, Louisiana.

September ____, 1957.

_____
SAMUEL C. GAINSBURGH